

**United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001**

Date: December 15, 1997

Case No. 96 INA 179

In the Matter of:

FIROOZEH KIAMANESH,
Employer

On behalf of

MJOGHAN BAKHTIARI,
Alien

Appearance: A. Gharib, Agent, of Glendale, California

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of MJOGHAN BAKHTIARI ("Alien") by FIROOZEH KIAMANESH ("Employer") under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer requested review pursuant to 20 CFR § 656.26.¹

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include Employer's responsibility to recruit U. S. workers at prevailing wages and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U. S. worker availability at that time and place.²

STATEMENT OF THE CASE

On March 4, 1994, the Employer, who then was living in Granada Hills, California, applied for labor certification for the Alien to fill the position of Tutor/Domestic Children.³ AF 34-35. The Job to be performed was described as follows:

Instruct youth ages 2 years and 5 years old in academic and religious course. Prepare outline of instructional material such as history of Iran through the centuries which is specifically for young children. Prepare and teach persian alphabet, numbers and color all coloring books. Teach alphabet letters in Persian language on a daily basis. Take all books to home and prepare all workbooks prior to start of tutoring. Teach in children's term the various holidays. What history was the background for specific holidays during the years. Play games, teach popular songs and religious prayers. Discuss with parents any additional special requirements for each child.

(Verbatim copy of original is uncorrected.) AF 34. The Employer's educational requirement was high school graduation, and the experience requirement was two years of experience in the Job Offered.⁴ The job was classified as Tutor, under DOT Code No. 099.227-034.

²Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

³The Employer's address later was changed to 17612 Bryant Place, Granada Hills, Ca 91344.

⁴Employer offered \$1,900 per month for this forty hour a week position from 9:00 A.M. to 6:00 P.M., with no overtime contemplated.

] **Notice of Findings.** By the Notice of Findings (NOF) issued on February 27, 1995, the Certifying Officer ("CO") said certification would be denied subject to rebuttal. AF 28-32. The CO cited two grounds for denial. (1) The CO found that the job requirement of two years of experience was unduly restrictive in violation of 20 CFR § 656.21(b)(2)(i)(A), explaining that the evidence was not persuasive that this position was a job for a tutor, since the children involved were of pre-school age. The CO added that evidence was required to demonstrate that the requirement of two years experience was usual for the successful performance of this occupation in the United States. (2) The CO also found that the Alien did not meet the job requirements as set forth in the application in that she did not have two years of experience in the job and that her education only included high school graduation. The CO then explained that the U. S. workers applying for this position cannot be held to job requirements that the Alien did not possess.⁵

The Employer's first rebuttal, which was dated May 4, 1995, addressed the requirements that the CO found restrictive under 20 CFR § 656.21(b)(2)(i)(A) by deleting such criteria and retesting the labor market. The Employer deleted the requirement that the tutor teach academic subject such as mathematics, reading, writing and religious courses to the children, who now were represented as four and seven years old. The job was then readvertised and the one application Employer received he rejected on grounds that the religion of the U. S. worker was Christian Science, while Employer's religion was Zoroastrianism.

The CO's Second Notice of Findings dated June 2, 1995, again denied certification subject to rebuttal. AF 11-13. The CO explained that the Employer had not removed the restrictive requirements, but had only shortened the job description. (1) While rebutting on the basis of a previous employer's statement that the Alien had one year of tutoring experience, the Employer continued to maintain the job requirement of two years of experience for U. S. workers seeking this position. (2) The Employer had rejected the U. S. worker who did apply on grounds that she did not possess the required training in Zoroastrianism. As this requirement is not a part of the job description in the application, however, the Employer cannot cite the lack of this qualification to justify the finding that the U. S. applicant was not qualified.

Rebuttal. The rebuttal dated June 20, 1995, first addressed the restrictive requirements of the foreign language, which he

⁵The CO cited inter alia **James Northcutt**, 88 INA 311 (Aug. 28, 1989); **Mario Kopeiken**, 88 INA 299 (June 27, 1989); and **Affinitec**, 87 INA 516 (Dec. 7, 1987).

said were duly deleted. The job description remaining still required that the worker tutor the children by teaching such academic subjects as mathematics, reading and writing, as well as courses in religion. Secondly, the Employer said that he had interviewed the U. S. worker who was referred, who stated that her mission as a Christian Scientist was to teach the family in the Christian Science religion. When Employer stated that his family had been Zoroastrians for generations and that they did not wish to convert to Christian Science, the U. S. worker said Employer would have to provide her the necessary books and she would train herself to teach Zoroastrianism, although during the interview she continued to discuss the Christian Science beliefs and practices. AF 09-10.

Final Determination. The CO's Final Determination of July 28, 1995, denied Certification. AF 06-07. The CO noted that both NOF's found the two year requirement to be excessive, since the duties appeared to be those of a Children's Tutor, rather than those of a Tutor.⁶ Although the CO noted Employer's removal of the Persian language requirement, the CO observed that he failed to address the NOF finding that both children were of pre-school age and were not yet involved in academic subjects, and that the requirement for two years of experience was excessive as a consequence.⁷ The CO found that Employer did not respond to the finding that the Alien was unqualified to meet the Employer's own criteria, as she had no more than one year of experience as a tutor in spite of the Employer's requirement of two years. As this finding was unaddressed, it was deemed admitted in the Final Determination.⁸ The CO then discussed the U. S. worker and the Employer's reaction to the interview with this person. Rejecting the Employer's comments, the CO did not find his objections to be based on credible inferences. AF 07

Appeal. Employer's request for review dated August 9, 1995, addressed the finding as to restrictive requirements by arguing that the DOT occupational code the CO applied had misdesignated the position for which the Employer sought certification. The Employer explained that, as the two code numbers bear disparate SVP ratings of 5 and 7, this should have been noted and corrected by the CO. The Employer then added that the Alien was, in fact, qualified by her experience as a kindergarten teacher from April

⁶The DOT job description for a Tutor is 099.227-034, while the job description for a Children's Tutor is 099.227-010.

⁷The CO's citation of **Richard Lum**, 94 INA 219 (June 27, 1995), was reviewed and found to govern the facts presented for the reasons stated by the panel in that case.

⁸The CO cited **Michael's Foods**, 90 INA 411 (Nov. 19, 1991).

1989 to May 1992, and that she had completed a tutor training course that extended from 1991 to 1992. The Employer then restated the discussion of the interview with the U. S. applicant that was described hereinabove.

DISCUSSION

His appeal was Employer's first comprehensive statement of his response to the issue that is pivotal to CO's analysis of this record. The Employer contended that the state employment service did not assign the correct DOT Occupational Code in the initial classification of this position, contending that the correct DOT Code number is 099.227-034. The DOT description of the work of a Tutor (education) is as follows:

Teaches academic subjects, such as English, mathematics, and foreign languages to pupils requiring private instruction, adapting curriculum to meet individual's needs. May teach in pupil's home.

See DOT Code No. 099.227-034, Dictionary of Occupational Titles. The Specific Vocational Preparation ("SVP") for a Tutor under DOT Code No. 099.227-034 is at level 7, which prescribes a time period of more than two years that may extend up to and including four years. See Appendix C, Dictionary of Occupational Titles.

The Employer then argued that the DOT Occupational Code that the state employment service assigned was No. 099.227-010, which refers to a Children's Tutor (domestic ser.). The DOT Code description of the work of a Children's Tutor (domestic ser.) is the following:

Cares for children in private home, overseeing their recreation, diet, health, and deportment; Teaches children foreign languages, and good health and personal habits. Arranges parties, outings, and picnics for children. Takes disciplinary measures to control children's behavior. Ascertains cause of behavior problems of children and devises means for solving them. When duties are confined to care of young children may be designated Children's Tutor, Nursery (domestic ser.)

See DOT Code No. 099.227-010, Dictionary of Occupational Titles. The SVP for a Children's Tutor under DOT Code No. 099.227-010 is at level 5, which prescribes a time period of more than six months that may extend up to and including one year. This, says the Employer, is wrong Occupational Code to apply to this position which is as a Tutor under 099.227-034.

After examining the Employer's application and occupational classifications by the State agency and by the CO under the DOT,

we agree that these two interpretations of the application were inconsistent: The State agency treated this as an application for alien labor certification of a Tutor under DOT Code No. 099.227-034 and the CO analyzed Employer's application as a request for certification for a Children's Tutor under DOT Code No. 099.227-010. AF 11, 28, 34.

The Employer argues that the CO has designated the wrong Occupational Code to apply to this position which, he contends is for a Tutor under 099.227-034. Employer is grossly mistaken. The State employment service did classify this job as Tutor under 099.227-034 when application was received, and its classification was maintained thereafter. AF 11, 28, 34. It may be that the State employment service was confused by the requirements in Employer's application that the tutor provide for these infants an "academic and religious course." Employer said he expected the Tutor to "[p]repare outline of instructional material such as history of Iran through the centuries which is specifically for young children." Each day the Tutor also is to teach these two and five year old children letters of the alphabet "in [the] Persian language," and the historical background "for specific holidays," as well as "popular songs and religious prayers." AF 34. When the ages of the Employer's children are considered, the DOT job functions of a Tutor under 099.227-034 are inconsistent with the care and education required by children who are two and five years old.

We note, however, that in the NOF the CO found (1) that the two years of experience specified by the Employer was unduly restrictive and (2) that the Alien did not have the two years of experience Employer required. Upon review of the entire record we observe that, notwithstanding the questions raised by the job classification under the applicable DOT provisions, the CO's finding in the NOF that the Alien did not have the two years of experience that Employer specified as a job requirement was not rebutted. Because it follows that the Alien could not have been hired for the job described in the Employer's application in any event, we agree with the CO that the Employer did not sustain his burden of proof.

Consequently, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

